No. 4095

In the

United States Circuit Court of Appeals

For the Ninth Circuit

THE BLUM-O'NEILL COMPANY, a Corporation,
Plaintiff in Error

vs.

F. J. SULLIVAN, *Defendant in Error*

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

REPLY BRIEF OF PLAINTIFF IN ERROR

DONOHOE & DIMOND,
Cordova, Alaska,
and
LYONS & ORTON,
920 Alaska Bldg., Seattle, Washington
Attorneys for Plaintiff in Error

Law Brief Printing Co., Seattle

No. 4095

In the

United States Circuit Court of Appeals

For the Ninth Circuit

THE BLUM-O'NEILL COMPANY, a Corporation,
Plaintiff in Error

vs.

F. J. SULLIVAN, *Defendant in Error*

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

REPLY BRIEF OF PLAINTIFF IN ERROR

For the sake of convenience, the parties will be designated in this brief plaintiff and defendant, as they were in the trial court.

On pages 5 and 6 of brief of plaintiff he states:

"Decisions of the United States Supreme Court, the federal courts and of the various states, on the question of vice-principalship are so hopelessly con-

flicting as to make it almost impossible to determine what the true rule is. The Ross case, 112 U. S. 377, 28 Law Ed. 787, attempted to make the question of vice-principalship dependent on position. The later cases modified and distinguished this rule and no satisfactory line of reasoning of any of the courts of the latter part of the nineteenth century seems to have been arrived at."

We submit that a careful examination and analysis of the decisions of the Supreme Court of the United States and the federal courts will disclose the fact that there is no such conflict in the holdings of those courts on the question of vice-principalship as is contended by plaintiff. It is true the holding in the *Ross* case cited by plaintiff and decided by the Supreme Court of the United States in 1884 is in conflict with later decisions of that court on the question of vice-principalship, but even the decision in that case would not warrant this court in holding that Frederickson was a vice-principal of the defendant at the time of plaintiff's alleged injury. Judge Field, in the *Ross* case, held that a conductor of a railway train was a vice-principal of the company operating the railway, because he had full and complete control of the train and all the employees operating the same, but there is no evidence in this record to show that Frederickson

had such authority over plaintiff. He did not select the plaintiff's horse or wagon; it is not claimed that he had the power to direct the plaintiff what route he should select or travel over; he had no control over the plaintiff as to when he should begin to work or when he should discontinue work; he did not employ or discharge the plaintiff. All of such authority over the plaintiff was exercised by defendant's vice-principal O'Neill.

The *Ross* case, however, has not been followed by the Supreme Court of the United States. It was modified by that court in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, and was expressly overruled by that court in *New England v. Conroy*, 175 U. S. 323, 20 Sup. Ct. Rep. 85. The *Baugh* case was decided by the supreme court in 1893 and the *Conroy* case in 1899. In the *Conroy* case the court said, among other things (20 Sup. Ct. 93):

"While the opinion in the Ross case contains a lucid exposition of many of the established rules regulating the relations between masters and servants, and particularly as respects the duties of railroad companies to their various employees, we think it went too far in holding that a conductor of a freight train is *ipso facto* a vice-principal of the company. An inspection of the opinion shows that

that conclusion was based upon certain assumptions not borne out by the evidence in the case as to the powers and duties of conductors of freight trains."

The court in the *Baugh* case, *supra*, sets forth lucidly the common law rule of the duties and obligations that a master owes to his servant, and so far as we have been able to discover, that exposition of the common law rule regarding such duties and obligations has never been modified by the Supreme Court of the United States or by any of the federal courts. The court in that case said (13 Sup. Ct. 921):

"Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work or by which he is to be surrounded shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity and cannot be obviated. But within such limits the master who provides the place, the tools and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to

the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects, therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution."

The plaintiff does not contend that the defendant was negligent in the employment of Frederickson, nor does he contend that Frederickson was not a fit and competent person to perform the work for which he was employed by defendant, nor does he contend that the wagon he was driving was defective, or the horse inefficient or difficult to manage.

The *Baugh* case and the *Conroy* case have been uniformly followed by the Supreme Court of the United States and the federal courts whenever the common law rule of fellow servant has been called in question. Many of the cases are cited on pages 13, 14 and 23 of defendant's original brief, and as stated in our original brief, the same rule was announced for Alaska by the Supreme Court of the United States in *Alaska Treadwell Gold Mining Company v. Whelan*, 168 U. S. 86, 18 Sup. Ct. Rep. 40, which case has been cited with approval by the Supreme Court of the United States and many of the federal courts, including this court. See cases cited, pages 13 and 14 of defendant's original brief.

ASSUMPTION OF RISK

Plaintiff contends (pages 13, 14, 15 and 16 of his brief) that he did not assume the risk of his employment voluntarily. He admits in his testimony (Tr. 36, 69 and 70), that he protested against Frederickson putting any more cases of milk or butter on the wagon; that the latter said he would have to take them or quit. It further appears from plaintiff's testimony (Tr. 62, 63, 70 and 71), that Frederickson handed the cases of milk and butter to plaintiff, who placed them on the seat and footboard of the wagon; that Frederickson obtained these cases from the door of the warehouse about twenty feet away from the wagon, and that he, Frederickson, carried such cases in his hands, one at a time, from the door of the warehouse to the wagon.

The increasing danger of the load as each extra case was placed on the wagon and replaced by the plaintiff was just as evident to plaintiff as it could have been to Frederickson or any one else, in fact, such danger should have been more obvious to plaintiff, since he was on the wagon, and since the evidence shows that he was more familiar with the streets over which he would pass with the load that

day. Plaintiff by reason of his position on the wagon was even in a better position than Frederickson to realize the danger involved in piling some seven cases of milk and butter on the seat and footboard of the wagon. Plaintiff's conclusion that he did not have time to get down from the wagon and remove to a place of safety during the time that the extra cases were being put on the wagon is not consonant with the facts testified to by himself. His own testimony shows clearly that Frederickson carried each box a distance of some twenty feet and then returned for another box, and that he (plaintiff) stowed the boxes away on the wagon, on the seat and the footboard around him.

There can be no doubt that plaintiff knew of the perils and dangers of overloading the wagon as he claims was done at the instance of Frederickson. We wish to call the court's attention to a discussion of the defense of assumption of risk found on pages 1207 to 1244, 28 L. R. A. (N. S.). The author of such note, on page 1221 of that volume, says:

"But such liability of the master is only *prima facie*, and may be rebutted, and is rebutted, according to practically every decision in which the question is expressly before the court and adjudicated by it, (with the exception of decisions in Missouri and North Carolina), by proof that the servant,

with actual or constructive knowledge of the defects and an appreciation of the dangers, entered or continued in the employment without complaint of the defects and without any promise on the part of the master to remedy them. By so entering or remaining in the service, with such knowledge of the defects, the servant is held to have assumed the risk of such defects, even though they are the result of the master's violation of his duty."

In *Union Pac. R. Co. v. Marone*, 246 Fed. 916, at page 924, the court said:

"A servant assumes the ordinary risks and dangers of his employment and the extraordinary risks and dangers which he knows and appreciates. Neither the order of a vice-principal to the servant to work in a dangerous place, or in a dangerous way, nor his assurance of the servant's safety, nor the servant's fear of losing his job, will release the servant from his assumption of the risk and danger where they were readily observable and were known and appreciated by him, unless the vice-principal makes a promise to remove them as an inducement for the servant's continuance in the service. Chicago, B. & Q. R. Co. v. Shalstrom, 195 Fed. 725, 729, 115 C. C. A. 515, 45 L. R. A. (N. S.) 387, and cases there cited; Seaboard Air Line v. Horton, 233 U. S. 492, 496, 503, 504, 507, 508, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B, 475; Bunt v. Sierra Butte Gold Min. Co., 138 U. S. 483, 484, 485, 11 Sup. Ct. 464, 34 L. Ed. 1031; Musser Sauntry, etc., Co. v. Brown, 126 Fed. 141, 143,

144, 61 C. C. A. 207; Walker v. Scott, 67 Kan. 814-816, 818, 64 Pac. 615; Showalter v. Fairbanks, Morse & Co., 88 Wis. 376, 60 N. W. 257, 258; Toomey v. Steel Works, 89 Mich. 249, 50 N. W. 850, 851; Kean v. Rolling Mills, 66 Mich. 277, 33 N. W. 395, 399, 400, 11 Am. St. Rep. 492; Lamson v. American Axe & Tool Co., 177 Mass., 144, 145, 58 N. E. 585, 83 Am. St. Rep. 267, opinion by Holmes, chief justice, now Mr. Justice Holmes; Bradshaw, etc., v. Railway Co., (Ky.) 21 S. W. 346, 347."

American Car & Foundry Co. v. Allen, 264 Fed. 647.

It is obvious from the plaintiff's testimony that he voluntarily assumed the risk incident to the carrying of the extra cases of milk and butter on the wagon he was driving, and there is no testimony in the record that even indicates that he was promised by Frederickson or any other agent of the defendant that he would not be required to carry such loads thereafter.

Plaintiff (Tr. 69), gave the following answers to the following questions:

"Q. I believe you say you protested against him putting on the extra stuff?

"A. Yes, sir; I did.

"Q. What did you say?

"A. I told him the wagon was loaded and there was no more could get on—if he found room to put them on.

"Q. What did he say?

"A. He said he would put them on the footboard.

"Q. Did he say anything else?

"A. No, sir; he just carried them out and put them on the footboard.

"Q. He placed them on the footboard and you put them on the seat?

"A. Yes, he put two on the seat and I put the rest."

Plaintiff's statement of the facts does not indicate the slightest coercion on the part of the defendant. It is true he says he protested against taking the extra cases, but his recital of Frederickson's statement to him concerning the matter and his reply thereto conclusively shows that he made no such protest, but merely said the wagon was loaded, and further stated to Frederickson if the later found room on the wagon to put them on. And after making such statement he proceeded to and did assist Frederickson in placing the cases on the wagon.

Accepting plaintiff's testimony as true, we submit there is nothing in the words or conduct of Frederickson with reference to the loading of the extra cases on the wagon that even suggests any coercive influence over plaintiff. Nor does such testimony show any unwillingness on plaintiff's part to assume all risk or danger which might or would be occasioned by loading and carrying on the wagon the extra cases of milk and butter which plaintiff claims Frederickson insisted should be done.

We respectfully submit the judgment of the trial court is erroneous and should be reversed, and the court directed to dismiss the action, or in any event to grant a new trial.

DONOHOE & DIMOND,
Cordova, Alaska,
and
LYONS & ORTON,
920 Alaska Bldg., Seattle, Wash.
Attorneys for Plaintiff in Error